Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

YVONNE CRYNS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* ROBERT E. HEWSON, JR., Director of Professional Regulation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Illinois Nursing and Advanced Practice Nursing Act violates the First and Fourteenth Amendments because it prohibits any person other than a licensed nurse from "engaging in conduct aimed at promoting, maintaining, and restoring health."

2. Whether the Illinois Nursing and Advanced Practice Nursing Act violates the Fourteenth Amendment because it prohibits any person other than a licensed nurse from "assessing healthcare needs."

3. Whether the Illinois Nursing and Advanced Practice Nursing Act violates the First and Fourteenth Amendments because it prohibits any person other than a licensed nurse from "providing counseling and health education."

4. Whether the Illinois Nursing and Advanced Practice Nursing Act violates the Fourteenth Amendment because it prohibits any person other than a licensed nurse from "using corrective measures to improve health status" during an emergency.

PARTIES TO THE PROCEEDING

Robert E. Hewson, Jr., Acting Director of the Illinois Department of Professional Regulation, replaced former Director of the Illinois Department of Professional Regulation, Leonard A. Sherman, and has been substituted in the caption of the case.

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois in *The People of the State of Illinois ex rel. v. Yvonne Cryns*, Docket No. 93412 is attached as Appendix A. The opinion of the Appellate Court of Illinois for the Second District in *The People of the State of Illinois ex rel. v. Yvonne Cryns* is attached as Appendix B. Excerpts of the transcript of hearing before Judge Michael J. Sullivan dated October 13, 2000 is attached as Appendix C.

STATEMENT OF JURISDICTION

The instant Petition for Writ of Certiorari seeks review by the United States Supreme Court of the final judgment of the State of Illinois Supreme Court, entered on February 21, 2003, wherein the Illinois Supreme Court interpreted the Illinois Nursing and Advanced Practice Nursing Act in a manner repugnant to the United States Constitution.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a).

STATUTES INVOLVED

The relevant part of the Nursing and Advanced Practice Nursing Act (NAPNA), 225 ILCS 65/5-1 *et seq.*, is attached as Appendix D.

STATEMENT OF THE CASE

After Heather Verzi became pregnant, she and her husband Louis Verzi decided that they wanted to deliver their child at their home. The Verzis held the belief that childbirth is a natural human process, not a medical process, and because of their beliefs they chose to deliver their baby in the privacy of their own home, without the aid of a doctor or nurse. The Verzis' alternative theories on health care included reliance on Heather's mother as their "doctor," although she was not a medical doctor. Throughout Heather's pregnancy, the Verzis relied upon Heather's mother for advice concerning Heather's health.

After researching natural childbirth alternatives, and undergoing a "Bradley Method" course on natural childbirth, the Verzis decided that they wanted to attempt a "water birth," a procedure in which the laboring mother is partially submerged in a pool of water during labor. Because the procedure was not available at hospitals, the Verzis sought a traditional midwife to assist them and to attend their home birth. In January of 2000, the Verzis met Yvonne Cryns, a self-employed traditional (non-nurse) midwife. Traditional (lay) midwifery is an unregulated employment activity in the State of Illinois. The Verzis hired Yvonne as their midwife to give them advice and to assist them with things they didn't know concerning the birth of their child. The Verzis chose Yvonne because she held similar beliefs to their own concerning natural childbirth and home birth.

After choosing Yvonne Cryns to be their midwife and to assist them during the home birth of their child, the Verzis had several meeting with Yvonne Cryns prior to Heather's due date. During their visits, Cryns used sound-amplifying devices to hear the baby's heartbeat. Cryns never held herself

out as anything other than a traditional midwife and specifically told the Verzis that she was not there to act as a nurse or a doctor. Cryns explained, and the Verzis understood, that in a home-birth setting, immediate medical care would not be available.

On August 19, 2000, at approximately 10:30 a.m. Heather Verzi went into labor. Yvonne was subsequently called to the Verzi's home and arrived around 1:30 p.m. Periodically during Heather's labor, Yvonne also used a Doppler and a fetoscope to listen for the baby's heartbeat. On one such occasion, Yvonne could not hear the baby's heartbeat. At that point, the circumstances became exigent and Yvonne assisted Heather to get the baby born. When the baby was born, he was not breathing and did not have a detectable heartbeat. Cryns began administering neonatal CPR and used an Ambu bag to provide ventilation. Cryns attempted to resuscitate the baby for approximately 10 minutes stopping every minute or so to listen for the baby's heartbeat. When the resuscitation efforts were not successful, 911 was called.

PROCEDURAL HISTORY

The case came before the trial court on the State's motion for preliminary injunctive relief to enjoin Yvonne Cryns from engaging in the practice of nursing and/or midwifery in the state of Illinois. During the evidentiary hearing the State elicited testimony from Louis Verzi and moved for admission of a videotape of the birth. The trial court admitted the videotape into evidence overruling Cryns objection based on foundation. However, the trial court went on to grant Cryns' motion for a directed verdict, finding that the State did not establish a *prima facie* case of a violation of the Nursing and Advanced Practice Nursing Act. (*See* Appendix C).

On the State's first appeal, the Appellate Court Second District remanded the case to the trial court with instructions for the court to re-rule after the court considered the videotape evidence. The trial court dutifully reviewed the videotape evidence but came to the same conclusion concerning the motion for directed verdict, finding again in favor of Yvonne Cryns.

On the State's second appeal, the Appellate Court Second District reversed the decision of the trial court in favor of Cryns and found *from the videotape evidence* that the State had established a *prima facie* case. (*See* Appendix B). Thereafter, Yvonne Cryns filed a Petition for Leave to Appeal with the Illinois Supreme Court seeking review of the Appellate Court's decision. Cryns' Petition for Leave to Appeal was allowed.

On appeal, the Supreme Court sustained Cryns' foundational objection to the admission of the videotape evidence, finding that the videotape evidence was improperly allowed into evidence. However, the Court went on to find, solely from the testimony of Louis Verzi, that Cryns' assistance to the Verzis during Heather's pregnancy and at the Verzis' home during the birth of their child, was in violation of the Illinois Nursing and Advanced Practice Nursing Act. The Court also found that, notwithstanding the exigent circumstances of the child's complete respiratory and cardiac distress, by performing cardio pulmonary resuscitation on the child, Cryns also violated the Act. (*See* Appendix A).

STANDARD OF REVIEW

Determining the constitutionality of a statute is a question of law reviewable *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

The Illinois Supreme Court's application of the Illinois Nursing and Advanced Practice Nursing Act, 225 ILCS 65/5-1 *et seq.*, (hereinafter "NAPNA"), to the facts of Yvonne Cryns' case resulted in violations of Cryns' constitutional rights under the First and Fourteenth Amendments. The NAPNA is unconstitutionally overbroad on its face because it interferes with First Amendment protections and fails to distinguish between conduct that may be proscribed and conduct that must be permitted. The NAPNA is also unconstitutionally vague because it does not give a person of ordinary intelligence a reasonable opportunity to what conduct the statute prohibits, so that she may act accordingly, and because the NAPNA was arbitrarily and discriminatorily enforced.

ARGUMENT

I. The Illinois Nursing and Advanced Practice Nursing Act Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

U.S. CONST., amend. XIV, § 1.

Freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elemental part of the rights of personal liberty and private property protected by the due process clause of the Fourteenth Amendment. *Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530 (1922). Likewise, the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of provisions of the Fifth [and Fourteenth] Amendment[s] to the Federal Constitution that no person shall be denied liberty or property without due process of law. *See Greene v. McElroy*, 360 U.S. 474 (1959); *United States v. Robel*, 389 U.S. 258 (1967). The State cannot arbitrarily interfere with private business or prohibit or unreasonably restrict lawful occupations. *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932). Consequently, Yvonne Cryns had a liberty and property interest in her unregulated employment as a traditional midwife.

Nevertheless, the Illinois Supreme Court's ruling effectively deprived Cryns of her liberty interest in her chosen profession and of her property interest in her continued employment as a traditional midwife.

A. The Nursing and Advanced Practice Nursing Act is Unconstitutionally Overbroad

Imprecise laws can be attacked on their face under two different doctrines. *Chicago v. Morales*, 527 U.S. 41, 52 (1999). The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep. *Id.*

In the case at bar, the NAPNA is unconstitutionally overbroad. NAPNA prohibits *inter alia* "assessment of healthcare needs," "the promotion, maintenance, and restoration of health," "counseling" and "health education," by anyone other than a licensed nurse. App. D-67a. Because the statute involves conduct and not merely speech, the overbreadth of the statute must not only be real, but substantial as well, judged in relationship to the statute's plainly legitimate sweep. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). However, notwithstanding the permissible goals of the NAPNA, its prohibitions are far too broad in their sweep. The Act fails to distinguish between conduct that may be proscribed and conduct that must be permitted.

Many lawful activities and occupations in Illinois involve the "assessment of healthcare needs;" i.e. feeling for a fever on a child's forehead, recommending and selling health foods, commercial vitamin production and sales, and physical

fitness training programs. Likewise, the list of lawful activities and occupations encompassing the "promotion, maintenance, and restoration of health" is significant and includes i.e. diet aids and literature, CPR classes, fitness training, etc.

The Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). In the case at bar, NAPNA is not narrowly tailored to accomplish the state's legitimate interests and instead ensnares lawful and prohibited conduct in the same dragnet.

When the law in Illinois makes it a civil and criminal offense for anyone other than a nurse to promote, maintain, and restore health, such a statute should be struck down as repugnant to the Constitution. The Illinois Supreme Court's ruling, ironically in the name of public health and welfare, does nothing but undermine the promotion, maintenance and restoration of public health in the state of Illinois.

I. The Illinois Supreme Court's Interpretation of the Nursing and Advanced Practice Nursing Act Deprived Yvonne Cryns of Her Rights Under the First Amendment to the United States Constitution.

a. First Amendment Right of Association

In *Roberts v. United States Jaycees*, 468 U.S. 609, 618-619 (1984), the Supreme Court held that there are two types of "freedom of association." The first type of freedom

of association requires that certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. *Id.* The Court further clarified the first type of freedom of association as being a "fundamental element of personal liberty." *Id.* The second type of freedom of association recognizes a right to associate for the purpose of engaging in those activities protected by the First Amendment such as; speech, assembly, petition for the redress of grievances, and the exercise of religion. *Id.* The Court held that, "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated." *Id.*

The Verzis chose Yvonne Cryns to join them in one of the most intimate moments in their life, the birth of their child in their home. Yvonne chose to associate with the Verzis as their midwife during Heather's pregnancy, labor, and childbirth. Such an intimate relationship and common endeavor must be secured against undue intrusion by the State in order to safeguard an individual's freedom of association. Given the intimate nature of the common endeavor that bonds expectant parents and a traditional midwife, the State must not be allowed to interfere with the freedom of association underlying that relationship.

The Supreme Court has long recognized that the Bill of Rights, in order to "secure individual liberty," must afford protection from unjustified governmental interference to "certain kinds of highly personal relationships." *Roberts*, 468 U.S. at 618. Most obvious among those relationships are those that involve family bonds, such as marriage,

procreation, education, and cohabitation with relatives. *Board of Directors of Rotary International, et al. v. Rotary Club of Duarte et al.*, 481 U.S. 537 (1987). The Supreme Court has not held that constitutional protection of the freedom of association applies only to family relationships. *Id.* at 545. In fact, the Supreme Court in *Roberts v. United States Jaycees*, 468 U.S. at 619-620, stated that the First Amendment protects those relationships that, "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." "Certain bonds" play, "a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs," which in turn, "foster diversity and act as critical buffers between the individual and the power of the State." *Id.* at 618-619.

The Verzis had come to trust Yvonne Cryns and felt strongly that she was the person they wanted to assist them during the birth of their child. Their deep attachment and commitment to Yvonne Cryns was demonstrated by their sharing the experience of the home birth of their child with Yvonne. The relationship between Yvonne and the Verzis must be afforded constitutional protection.

The bond between Yvonne and the Verzis also plays a critical role of the culture and traditions of midwifery in the Nation by cultivating and transmitting shared ideals and beliefs about home birth and natural childbirth, which fosters diversity. The purpose of protecting these bonds is central to any concept of liberty and allows individuals to, "define one's identity." *Id.* at 619. The State must not be allowed to interfere with the intimate bond between expectant parents and a traditional midwife by statutory inference.

The Supreme Court has held that only relationships with such attributes as, "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," lead to an understanding of freedom of association as an intrinsic element of personal liberty. *Id.* at 620. In determining the limits of State authority with regards to a particular type of association, the Court must assess "where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Rotary International*, 481 U.S. at 546. The relevant factors to this assessment include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts*, 468 U.S. at 620.

In the instant case, the Verzis chose Yvonne to assist them with the birth of their child in their bedroom, in their home; the attendant group was very small. The Verzis and Yvonne held the same beliefs with regard to natural childbirth and home birth without a nurse or doctor present. The Verzis also specifically excluded others, including nurses and doctors, from participating in their home birth experience. Clearly the intimate relationship between the Verzis and Yvonne enjoys constitutional protection because sharing the birth experience of their child is one of the most intimate of personal attachments.

The State should not be permitted to regulate the Verzis' or Yvonne's right to an intimate relationship by applying the Nursing and Advanced Practice Nursing Act to demolish their relationship merely because Yvonne is not a licensed nurse. Yvonne Cryns was engaged in a lawful, unregulated employment activity as a traditional midwife and the Court

should protect her First Amendment constitutional right of intimate association based on the decisions in *Rotary International* and *Roberts*.

The Due Process clause specially protects those fundamental rights and liberties which are objectively deeply rooted in this Nation's history and tradition. *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). The history of traditional midwives assisting mothers at childbirth dates back to Biblical times. The rights of association that exist between a traditional midwife and expectant parents during pregnancy and childbirth are deeply rooted in American and Illinois' culture and history. One cannot acknowledge the right of association between midwives and mothers at childbirth without equally acknowledging the midwife's liberty interest in providing assistance to mothers during childbirth. The two fundamental rights and liberties are inextricably intertwined. Consequently, the right of association between midwife and client(s) and the liberty interest in employment as a traditional midwife should be entitled to protection under the Due Process Clause of the Fourteenth Amendment as a fundamental right.

b. First Amendment Right to Free Speech

The government has no power under the First Amendment to restrict expression because of its message, its ideas, its subject matter or its content. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The hallmark of the protection of free speech is to allow free trade in ideas, even ideas that the overwhelming majority of people might find distasteful or discomforting. *Virginia v. Black*, 123 S. Ct. 1536, 1547 (2003). The First Amendment ordinarily denies a State the power to prohibit dissemination

of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. *Id.* at 1547.

The Verzis and Yvonne Cryns' shared a common belief in the natural childbirth process and in home birth without the assistance of a nurse or doctor; their exchange of ideas in that regard is protected by their First Amendment right of free speech. Although the majority of citizens may prefer a hospital setting in which to give birth, under the Constitution, the Verzis and Yvonne are permitted to freely exchange their ideas concerning natural childbirth and home birth, even though the majority of people might find such ideas distasteful or discomforting. The State has no authority to prohibit the dissemination of ideas and information encompassing a belief in natural childbirth and in home birth, in favor of a majority opinion to the contrary.

The NAPNA's prohibition against "counseling" and "health education," by traditional non-nurse midwives, is undermined by permitting "counseling" and "health education" activities by other non-nurses. The disparate application of the NAPNA to traditional midwives, and not to other non-nurses who render counseling and health education services without a nursing license, leads to the conclusion that the NAPNA is being deployed in this instance based upon the content of the information exchanged concerning natural childbirth and home birth. However, content-based regulations are presumptively invalid under the First Amendment. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). When the Illinois Supreme Court held that Yvonne Cryns violated the Nursing and Advanced Practice Nursing Act by providing counseling and health education to the Verzis, it violated her First Amendment right to free speech.

B. The Nursing and Advanced Practice Nursing Act is Unconstitutionally Vague

Even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Chicago v. Morales*, 527 U.S. at 52 (1999). A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999). Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Id.* The NAPNA fails on both counts.

I. The Nursing and Advanced Practice Nursing Act Fails to Provide Adequate Notice of the Conduct it Prohibits

The NAPNA does not expressly prohibit giving advice to expectant parents about home birth and natural childbirth, or helping expectant parents through the birth of their first child. NAPNA does not expressly prohibit listening to a heartbeat with a stethoscope, fetoscope, Doppler, or any other sound amplifier. NAPNA does not expressly prohibit the use of cardio-pulmonary resuscitation on an infant in cardiac distress during an emergency. Because the statute does not expressly prohibit these acts, the Illinois Supreme Court had to interpret the statute to apply to Cryns.

The Illinois Supreme Court found that Yvonne Cryns violated the NAPNA 1) by meeting with expectant parents during a pregnancy and advising them concerning home birth

and natural childbirth, 2) by attending the childbirth and helping the expectant parents through the birth of their first child, 3) by listening to a baby's heartbeat *in utero* with the aid of a sound amplifier, and 4) by administering cardio pulmonary resuscitation (CPR) to a baby in cardiac distress during an emergency.

It is a basic principle of due process that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws may trap the innocent by not providing fair warning. *Id.* A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. *Id.* All are entitled to be informed as to what the State commands or forbids. *Id.*

In the case at bar, the relevant provisions of NAPNA are too vague to provide adequate notice to persons of ordinary intelligence that 1) consulting with expectant parents concerning home birth and natural childbirth is a violation of the Act, or 2) that listening to a heartbeat is a violation of the Act, or 3) that attending a home birth and helping the expectant parents through the birth of their child is a violation of the Act. (*See* Appendix D).

II. The Nursing and Advanced Practice Nursing Act Encourages Arbitrary Deprivation of Liberty Interests

The relevant provisions of the NAPNA were arbitrarily and discriminatorily enforced against Yvonne Cryns, and not against others who are similarly situated. The conduct that constitutes proscribed "counseling" and "health education" is undefined in the NAPNA. Cryns was found to have provided "counseling" and "health education" in violation of the NAPNA because she is not a licensed nurse in the State of Illinois. However, the State of Illinois allows health education classes in public schools to be taught by non-nurses without their satisfying the requirements for licensure under the NAPNA. Likewise, private courses on natural childbirth offer counseling to expectant parents concerning childbirth, and provide health education concerning labor and delivery, yet the State permits private counseling and health education by non-nurses in these instances as well. Finally, Cryns was found to have violated NAPNA by performing cardio pulmonary resuscitation on an infant in cardiac distress during an emergency, however, cardio pulmonary resuscitation is taught by many non-nurses through the American Red Cross, without attaining prerequisite nursing licensure.

The Illinois Supreme Court randomly and discriminatorily refused Yvonne Cryns the benefits of the emergency exception in the NAPNA, despite its obvious applicability to the facts at bar. Because the NAPNA encourages the arbitrary deprivation of protected liberty interests and discriminatory enforcement, it is unconstitutionally vague.

CONCLUSION

Illinois law makes it a criminal and civil offense for anyone other than a nurse to promote, maintain, and restore health, to assess healthcare needs, and to take corrective measures to improve health status. Illinois law also makes it a criminal and civil offense for anyone other than a nurse to administer cardio-pulmonary resuscitation to an infant in cardiac and respiratory distress during an emergency. Illinois enacted said legislation in the name of public health.

The Illinois Supreme Court made its decision based upon the Court's disfavor of traditional midwifery and home birth. In its closing comments the Court tellingly states "Although we understand plaintiff's [the State's] concerns with respect to the continued existence of lay midwifery in Illinois, we are constrained to apply the law as enacted by the General Assembly." App. A-36a. "If the statute as enacted seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to the Court." *Id.* Yvonne Cryns respectfully disagrees. When a State statute operates to unjustly deprive citizens of their constitutional rights, resort to the United States Supreme Court is proper.

Although the Illinois Supreme Court recognized the legal existence of traditional midwives, it did not consider Yvonne Cryns' constitutional rights when it applied the NAPNA to her unregulated employment activities. The right to attend a home birth and the right to practice the teachings of natural childbirth, are fundamental rights centering on the First Amendment right of association and right to free speech. The right to engage in unregulated employment activities is also a fundamental right stemming from the Fourteenth Amendment liberty interest in pursuing one's chosen profession. These cherished constitutional rights require the protection of the Courts.

Yvonne Cryns was a traditional midwife who was not engaged in the practice of nursing, or advanced practice nursing, nevertheless, the Illinois Supreme Court interpreted the statute to apply to Cryns. The court was able to apply the statute to Cryns because the NAPNA is unconstitutionally overbroad and vague. Vague laws offend due process. At oral argument before the Illinois Supreme Court, when counsel for the State was asked how citizens were to know whether their conduct violated the NAPNA, counsel for the State replied that the Department of Professional Regulation would know what conduct violated NAPNA, and that the Department would use its discretion in leveling charges against individuals. Yvonne Cryns respectfully submits that such a standard violates due process.

Accordingly, Yvonne Cryns respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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